Supreme Court, U.S.
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(3)

No. 90-1088

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

EVA O. RETTIG, Cross-Petitioner,

v.

KENT CITY SCHOOL DISTRICT;
DONNA G. LIGHTEL, In her Official Capacity as Superintendent, Kent Public Schools;
MICHAEL J. CHRIN, In his Official Capacity of Director, Child Study and Special Education, Kent Public Schools;
BOARD OF EDUCATION OF THE STATE OF OHIO;
FRANKLIN B. WALTER, In His Official Capacity as Superintendent for Public Instruction of the State of Ohio,
Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO LOCAL RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Petitioner who, under the provisions of the Handicapped Children's Protection Act, 20 U.S.C. 1415(e)(4), seeks recovery of all appropriate costs, including attorneys fees, and who has filed a timely Cross-Petition dependent upon the success of a properly and timely filed Original Petition, is entitled to all appropriate relief from This Court.

LIST OF ALL PARTIES

Original Petitioner: Thomas M. Rettig

Cross-Petitioner: Eva O. Rettig

Respondents: Kent City School District; Donna G. Lightel, In her Official Capacity as Superintendent; Michael J. Chrin, In his Official Capacity of Director, Child Study and Special Education; Board of Education of the State of Ohio; Franklin B. Walter, In His Official Capacity as Superintendent of the State of Ohio.

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TABLE OF AUTHORITIES

STATUTES

United States Code

Title 20, Sec. 1400 *et seq.*(EHA)..10,11,14,17

Title 20, Sec. 1415(e)(4)(HCPA)..1,6,11,12,14

Title 28, Sec. 2106 4,13

OTHERS

Rules of Court

S. Ct. R. 12.3 4,12,14,15

S. Ct. R. 13.5 12

S. Ct. R. 24.1 5

S. Ct. R. 24.2 5

Textbooks

R. Stern, Supreme Court Practice 380 (6th ed. 1986). 15

OPINIONS AND JUDGMENTS BELOW

The 24-line "Opinion of the Sixth Circuit Court" was ordered to be unreported; Orig. Pet. App. VOL. III AA contains a true copy. A copy of the U.S. District Court's unpublished Memorandum Order is included in VOL. III A at 83-101. The exhaustion of administrative remedies required by the Education of the Handicapped Act (EHA) is documented in VOL. I.

JURISDICTION

It appears that both sets of opposing counsel are deliberately misleading This Court by stating the same wrong date on which the Cross-Petition allegedly was filed. They are blatantly wrong in asserting that the Cross-Petition was filed on 7 Jan. 1991. See State's Waiver dated 5 Feb. 1991 and p. 1 of Local Respondents' Brief in Opposition filed on or about 21 Feb. 1991.

On 27 Nov. 1990 Thomas M. Rettig filed, *pro se* and *in forma pauperis*, his timely Petition. On that day he provided copies to

all parties below, including his mother. Since he lives with his parents, his mother received her copy on that day.

Because of their acts and omissions concerning her handicapped son, Respondents continue to owe Eva Rettig the return of several thousand dollars for various costs related to this lawsuit, including attorneys fees. When Thomas Rettig finally prevails on the merits, Respondents will be required to return to her what is rightfully hers.

For this reason, on 26 Dec. 1990, This Court timely received the filing fee and forty copies of her Cross-Petition which is contingent upon the success of the Original Petition. On 26 Dec. 1990 State Respondents received their three copies of the Cross-Petition; and Local Respondents received theirs on 28 Dec. 1990.

In a letter dated 2 Jan. 1991, Mrs. Loretta Ruffin, Assistant Clerk, returned 39 of the 40 copies, demanding certain minor corrections and a prompt return "in order for

the case to be docketed." The Court provided opposing counsel with copies of that letter.

Under cover of a letter dated 5 Jan. 1991, by express mail, Cross-Petitioner returned to This Court the 39 corrected Cross-Petitions. Respondents' counsel were mailed copies of the letter together with directions to page and line of the Cross-Petition where the corrections (with gummed backing) were to be inserted. As mailed to opposing counsel, the corrections were the same as those inserted by Cross-Petitioner in the 39 copies returned to the Court.

By letter dated 10 Jan. 1991, Assistant Clerk Ruffin informed Mrs. Rettig that her Cross-Petition "was docketed in this Court on December 26, 1990 as No. 90-1088." Enclosed were forms "for notifying opposing counsel that the case was docketed."

On 13 Jan. 1991, Eva Rettig duly notified opposing counsel that her Cross-Petition was docketed on 26 Dec. 1991.

Since it is dependent on the success of the Original Petition timely and properly filed by Thomas Rettig, the Cross-Petition for costs, including attorneys fees, was timely and properly filed 29 days after receipt of the Original Petition. *See* S. Ct. R. 12.3. For these reasons, This Court has jurisdiction to grant both the Original and Cross-Petitions. This Court is urged to invoke its statutory power under 28 U.S.C. 2106.

STATUTORY PROVISIONS INVOLVED

State Respondents filed no brief in opposition to either of the two petitions wherein they should have presented those provisions of law supporting their brief. Local Respondents filed two such briefs, but neither brief contained a section addressing the "Constitutional, Statutory, etc. Provisions Involved." Since Respondents did not include their own version of required provisions upon which they base their briefs in opposition, This Court must now conclude that all Respondents are "satisfied with their

presentation by the other side." S. Ct. R. 24.2. provides in pertinent part:

> Items required by subparagrahps .1. ... (f) of this Rule need not be included unless the respondent ... is dissatisfied with their presentation by the other side.

The "other side" consists of two (2) parties. Each party filed a Petition based upon those provisions of law appropriate to the individual's circumstances. (1) Thomas M. Rettig filed the Original Petition citing the constitutional and statutory provisions whose text he filed as Volume IV of the required appendix to said Petition. He also filed a Reply Brief. (2) Relying on that Original Petition, and on the provisions of the Handicapped Children's Protection Act (HCPA) which, in 1986 amended the EHA, the mother of the Original Petitioner filed a Cross-Petition for the return of her monies, including attorneys fees. This Court must now conclude that all Respondents were fully satisfied with the provisions of law "presented by the other side." Dissatisfied respondents must include in their briefs in

opposition their own section of provisions of law upon which they base their arguments. *See* S. Ct. R. 24.1. State Respondents filed no briefs and Local Respondents' briefs contain no such provisions.

The Cross-Petition specifically relies on the Original Petition, its four-volume Appendix, and on the following provisions of the HCPA:

> SEC. 2. Section 615(e)(4) of the Education of the Handicapped Act is amended by inserting "(A)" after the paragraph designation and by adding at the end thereof the following new subparagraphs:
>
> AWARD OF ATTORNEYS FEES
>
> "(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.
>
> EFFECT OF EDUCATION OF HANDICAPPED ACT ON OTHER LAWS
>
> SEC. 3. Section 615 of the Education of the Handicapped Act is amended by adding at the end thereof the following new subsection:
> "(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other

Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.".

EFFECTIVE DATE

SEC. 5. The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

Approved August 5, 1986.

Orig. Pet. App. Vol. IV. Based upon Sec. 3 above, the Original Petitioner seeks the full enforcement of his rights to compensatory free appropriate public education (FAPE), services, and damages. Based upon Secs. 2 and 5 above, Cross-Petitioner seeks the return of the vast sums of monies she spent because of Respondents' denial of FAPE and services to her son while a handicapped child, and because of State Respondents' repeated denials of his right to due process each time his administrative complaint

reached them for review.

It is under this law that State Respondent's Waiver and Local Respondents' Briefs must be scrutinized, because they present no other Constitutional or statutory provisions to This Court.

STATEMENT OF THE CASE

Since State Respondents filed no brief in opposition, they provided no "statement of facts." However, they filed an "express waiver" filled with misstatements and omissions. As documented by the administrative record, State Respondents have repeatedly refused the Original Petitioner his right to due process before affirming and joining in Local Respondents' denial of his right to FAPE and services throughout his school-age years. *See* Orig. Pet. App. VOL. I 96-108; 117-119; 127; 131-133; and VOL. II 142-152; 157-158f; 171-173; 177-177a; 280-296; 308-311. Further, since 1979, State Respondents have not only been affirming Local Respondents, but have been joining them

in opposing Petitioner in the Federal courts.

No Federal court has ever reviewed the so-called procedural safeguards which State Respondents accorded Petitioner when his complaints against Local Respondents reached them. *See* Orig. Pet. App. VOL. III. Petitioner Thomas Rettig cannot win his case on its mertis as long as the Federal courts refuse to review the empty State procedures accorded him by State Respondents. He cannot win his case on the merits against Local Respondents until those State procedures are declared violative of his Federal rights. Once the appropriate Federal Court adjudicates those less than meaningless so-called due process procedures, that Court will also finally adjudicate Local Respondents' violative acts and omissions concerning Thomas Rettig.

Until those declarations are made by the appropriate Court, there is also no chance that Cross-Petitioner will have returned to her the vast sums of money squeezed from the

family's coffers precisely because these cruel Respondents have been mercilessly denying innocent and helpless Thomas Rettig his basic rights to due process and equal protection of the law.

To that end, on 12/12/86, while Thomas Rettig was yet entitled to the protections and benefits of the EHA, he filed his own administrative complaint followed by his own Federal complaint, his own briefs, and his own Petition in This Court. To the point that his parents' EHA rights to participation in the development of a FAPE are part and parcel of all applicable law, those rights denied them are included in Thomas Rettig's Petition and Reply Brief which demonstrate, based on the administrative and court record appended to his Petition, the willfull and total denial of FAPE and services to Thomas Rettig. His parents will be accorded their right to participation when This Court of Last Resort provides or provides for the enforcement of Thomas Rettig's rights.

Cross-Petitioner's right to have her monies returned is directly tied to her son's success on the merits. Therefore, she now incorporates by reference herein his Petition's Statement of Facts and Reasons For Granting his Petition; and his Reply Brief.

Her Cross-Petition included only those Facts which were germane to her issue of the monies she expects to have returned to her. She included this issue in the administrative complaint, as required by the EHA/HCPA, and carried it all the way through the administrative and court procedures.

In their Waiver, State Respondents completely ignored the issue which, in large part, is due to their refusals to accord Thomas Rettig his EHA due process right to equal protection of the law. Had they done their part, Cross-Petitioner might have been spared the expense of thirteen years of litigation.

The Statement of Facts contained in Local Respondent's brief opposing the Cross-

Petition ignores its content completely by writing it off as "irrelevant." Their Statement suffers from critical omissions concerning the rights of Original Petitioner Thomas Rettig. It improperly commingles his rights with those of his parents' and it openly misrepresents the rights of the Cross-Petitioner. For these reasons, Cross-Petitioner directs This Court to her Cross-Petition's Statement of Facts which she incorporates herein by reference.

SUMMARY OF ARGUMENT

The Cross-Petition is based upon the provisions of the HCPA concerning recovery of costs, including attorneys fees. It was properly and timely filed in accordance with S. Ct. R. 12.3. Because of its dependency on the timely filed Original Petition's success, it will be granted under the provisions of S. Ct. R. 13.5. The District Court denied all relief. *See* Orig. Pet. App. VOL. III A 94. Appellate review thereof was withheld. *See* AA 7-8. The District Court incorrectly

applied several bars to Petitioner Thomas Rettig's claims to due process and equal protection, including *res judicata*, which directly and adversely impacted on Cross-Petitioner's issue. To the litany of wrongful applications of various bars the Sixth Circuit Court's Memorandum Order added yet another: mootness. Because of the manifest injustice, This Court is urged to invoke its statutory power under 28 U.S.C. 2106.

ARGUMENT

In their 5 Feb. 1991 Waiver, State Respondents assert that the Cross-Petition is "frivolous." Their reason is a purported untimeliness under the rules of this Court. Cross-Petitioner directs This Court to the section entitled "Jurisdiction," above, which she now incorporates herein. The Cross-Petition was timely filed.

In that same Waiver, State Respondents further attack the Cross-Petition "because Mrs. Rettig stands as a potential petitioner in this case and not a respondent to her

son's petition... She is ineligible to claim status as a cross-petitioner under R. 12.3."

As stated above, the award of all costs related to this litigation, 1970 to present, is authorized by the HCPA, as quoted above, and is contingent upon the success on the merits of the handicapped Original Petitioner who continues to seek enforcement of his rights to due process and equal protection which Respondents denied him while he was a handicapped child. Between 12 Dec. 1986 and 31 July 1987, while still a handicapped child, he exhausted the administrative procedures required by the EHA/HCPA before he brought his improperly dismissed present complaint in Federal court.

It was under this same law, as stated above, that Cross-Petitioner exhausted her administrative remedies and thus far unsuccessful Federal court procedures concerning her own issue. Her own issue will not be resolved until the acts and omissions of State Respondents are adjudicated. For

this reason, she filed her issue as a Cross-Petition dependent on her son's Original Petition. S. Ct. R. 12.3 fit her particular circumstances perfectly. She also consulted R. L. Stern, *et al.* Supreme Court Practice 380 (6th ed. 1986). This eminent authority states:

> A cross-petition for certiorari is a petition filed after another party has already filed a petition in the same case. Although one usually thinks of a cross-petition as opposing the position of the initial petitioner, the rules read literally do not contain any such limitation.

For these reasons, Cross-Petitioner properly filed her timely Cross-Petition dependent upon her son's Original Petition which he properly and timely filed. As presented in their Waiver, State Respondents' arguments are mere sham. This Court should recognize them as bogus.

In their Brief in Opposition to the Cross-Petition, Local Respondents present the same bogus argument made by the State which This Court is urged to disregard as well. Beyond that argument, Local Respondents

"object to the cross-petition" for a purported lack of "relevancy" in its "application to the present case." *See* p. 10. They then argue that the Cross-Petitioner has not been successfull in vindicating her right to recovery of all monies due her. However, their argument completely ignores the conditions under which this Cross-Petitioner will be successful: Only when the Original Petitioner succeeds on the merits of his case. For more than twenty years, Local Respondents have denied Thomas Rettig's right to equal protection under the law. For thirteen years, these Respondents have stood in the way of vindicating the Original Petitioner's rights to due process and equal protection. They all know, as This Court knows, that unless the Original Petitioner's rights are enforced by the appropriate Court, Cross-Petitioner's issue will remain unadjudicated. The family's limited resources will have been wasted on empty procedures totally meaningless to a beloved son, brother, and grandson.

The State of Ohio's policy to refuse due process to its handicapped children and their parents will remain unchecked. The EHA's expressed purpose and public policy of extending FAPE to handicapped children, and their guaranteed rights to challenge and vindicate their right to equal protection under the law will remain defeated.

CONCLUSION

Based upon the foregoing, as well as the Original Petition and the Cross-Petition, the contents of which are incorporated herein by reference, and based upon This Court's review of the documents contained in the four volumes to the Original Petition, Cross-Petitioner fervently prays that This Court grant both Thomas Rettig's Original Petition docketed as case number 90-6388 and her Cross-Petition docketed as case number 90-1088.

Respectfully submitted.

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